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In the Supreme Court of the United States

October Term, 1958

JIMMY KATIS HOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 735

JERRY KEITH ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 9–15) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959. The petition for a writ of certiorari was filed on February 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly quashed a subpoena for production of F.B.I. reports considered by the hearing officer in relation to petitioner's claim for classification as a conscientious objector, where

the hearing officer's résumé reported that the statements of witnesses were all favorable to petitioner.

2. Whether the classification of petitioner in I-A-O, available for noncombat service, had basis in fact.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Section 6(j) [50 U.S.C. App. 456(j)]:
>
> Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [sec-

tion 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such a claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the

period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit affirming his conviction of wilfully refusing to submit to induction in the armed forces as a noncombatant. Petitioner was sentenced to imprisonment for one year.

The selective service file, which was introduced in evidence, shows that petitioner, a member of Jehovah's Witnesses, registered with his draft board in November 1950. He sought exemption as a minister (F. 110)[1] and also filed the special form for conscien-

[1] The designation "F." refers to the selective service file; a photostatic copy of this file has been lodged with the clerk.

tious objectors (F. 98–105). The local board classified him I–A and petitioner appealed. Pursuant to Section 6(j) of the Universal Military Training and Service Act, his case was referred to the Department of Justice for hearing. Petitioner was given a summary of the result of the F.B.I. investigation, reading in part as follows (F. 77):

> Neighbors, references and acquaintances state that he has been an active member of the society and that he enjoys an excellent reputation of character. There is nothing in the investigative reports which would indicate he is not sincere in his claim to being a conscientious objector on the basis of his religious training and belief.

The hearing officer and the Department of Justice found that petitioner was sincere in his objections to combat service, but that his objections to noncombatant service were based solely on the contention that his induction would interfere with his religious activity. The Department recommended that petitioner be classified I–A–O (F. 75–76). On September 14, 1954, the appeal board classified petitioner I–A–O (F. 74).

Petitioner's case was reopened and he made a personal appearance before the local board. He answered a questionnaire largely concerned with his claim to ministerial status, but which also had some questions regarding conscientious objection. In response thereto he stated, *inter alia*, that he would not perform civilian work if classified as a conscientious objector since "The Bible says we shall not become friends of the World. Friendship with the World

is enmity with God." (F. 69). The local board classified petitioner I-A-O and the government appeal agent noted an appeal so that "all of the statutory rights of appeal may be exhausted in this case" (F. 64). The file was again forwarded to the Department of Justice for hearing. The résumé of the supplemental F.B.I. investigation again reported that the interviews had been favorable to petitioner. It read in part as follows (F. 53):

> Neighbors, references, and religious affiliates all agreed that the registrant is of excellent character and reputation and a sincere active member of Jehovah's Witnesses. None had any unfavorable information concerning the registrant's character; many of the same persons were previously interviewed and advised presently that they had no reason to change their opinion of the registrant. All persons interviewed believed that the registrant is sincere in his religious beliefs and in his attitude toward military service.

The report from the Department of Justice concluded that petitioner's position at the second hearing was essentially the same as at the first, although petitioner had stated, with respect to noncombatant service, that if one assists as a noncombatant, it is the same as killing. The Department reached the conclusion that "whereas the registrant has sustained his conscientious objections to combatant military training and service based on his religious training and belief, he has failed to sustain his conscientious objection to noncombatant military training and service" (F. 50-52). The Department recommended that

petitioner be classified I–A–O, available for noncombatant service.

After petitioner had received a copy of the Department's report, as required by this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407 (see F. 49), he wrote a letter to the Appeal Board, stating in part as follows (F. 47):

> 1. My claim for exemption as a Conscientious Objector is based solely on the fact that I am a regularly ordained Minister of the Gospel.
>
> 2. Because of this I wish to notify the Board of my request to be classified as a Minister 4D. In support of this I submit the following information some of which you have on file.

Petitioner was classified I–A–O and ordered to report for noncombatant service (F. 42, 116). He reported but refused to submit for induction (R. 48–49).

ARGUMENT

1. The only question argued in the petition for a writ of certiorari is the propriety of the trial court's action in quashing subpoenas duces tecum, which petitioner attempted to have issued prior to trial, seeking production of the F.B.I. reports which were before the hearing officer (R. 4–10). As noted in the Statement, petitioner was given the résumés which were sent to the Appeals Board, and those résumés "contain only laudatory statements concerning [petitioner's] character, reputation and sincerity" (Pet. 13).

As the petition itself states (Pet. 6–7), the issue sought to be raised has been decided adversely to petitioner's contention by three courts of appeals since

the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657; certiorari was sought in two of these cases and denied. *Leifer* v. *United States*, 260 F. 2d 648 (C.A. 6), certiorari denied, January 26, 1959, No. 525, this Term; *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927, No. 804, O.T. 1957; *Blalock* v. *United States*, 247 F. 2d 615 (C.A. 4). We respectfully refer the Court to the government's briefs in opposition in the *Leifer* and *Bouziden* cases.

The only new consideration advanced in this petition is the opinion of the United States District Court for the Southern District of New York in *United States* v. *Eliasson*, decided February 2, 1959 (Pet. 20–23) in which that court ruled, contrary to the decisions cited above, that a registrant was entitled to inspect the investigatory reports, but that the names and addresses of informants could be eliminated prior to inspection. The Second Circuit has not had occasion to pass on this issue, and there is thus no conflict among the circuits.

Certainly this is not a case in which there is any occasion to decide whether the doctrine of *United States* v. *Nugent*, 346 U.S. 1, should be qualified. Inasmuch as everything in the résumés of investigative reports was favorable to petitioner and the Appeals Board had before it all of the evidence which petitioner adduced, it is unreal to suggest that petitioner has suffered any prejudice.

2. Petitioner raises as a question (but does not argue) whether there was any basis in fact for classifying him I–A–O, available for noncombatant service.

This question was also before this Court, on essentially similar facts, in the *Leifer* case, No. 525, this Term, certiorari denied, January 26, 1959. In that case, as in this, the Selective Service System found that the registrant had conscientious scruples against killing; but that the religious scruples against killing were not the reason for refusal to do noncombatant work; that the refusal to perform noncombatant service, or indeed any service, was based on the notion that service would interfere with the registrant's ministerial duties. This objection to service is not recognized by the Universal Military Training and Service Act. *Tomlinson* v. *United States*, 216 F. 2d 12, 18 (C.A. 9), certiorari denied, 348 U.S. 970. There was thus evidence to support the selective service classification. *Estep* v. *United States*, 327 U.S. 114, 122.

CONCLUSION

The decision below is correct and there is no conflict among the circuits. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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